Filed 6/7/07 Michael O. v. Sup. Ct. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL O. and
FRANCES O.

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES; ALAN M. et al.

Real Parties in Interest.

B197215
x-ref. B177948, B183736

(Super. Ct. No. CK 51349)
(Debra Losnick, Commissioner)

ORIGINAL PROCEEDINGS; petitions for extraordinary writ. Granted.

Carrie Clarke for Petitioner Michael O.

Marissa Coffey for Petitioner Frances O.

No appearance for Respondent.

No appearance for Real Party in Interest Los Angeles County Department of Children and Family Services.

Carlson, de Klerk & Sherman, John E. Carlson and Nancy E. Nager for Real Parties in Interest Alan M. and Vicki M.

Law Firm of Timothy Martella, Eliot Lee Grossman and Philip C. Cicconi for Minor Rachel O.

Frances O. and Michael O. (collectively, "parents"), the parents of dependent child Rachel O. and her siblings Jeremy and Kaitlyn, petition for extraordinary writ review of orders granting Rachel's petition alleging changed circumstances pursuant to Welfare and Institutions Code section 388[1] and setting a second permanency planning hearing pursuant to section 366.26. (§§ 366.22, 366.26; California Rules of Court, rule 8.452.) These recent orders issued after we earlier reversed the juvenile court's denial of Frances' section 388 petition and termination of her parental rights and ordered the juvenile court to return Rachel to her parents. (*In re Rachel O.* (Feb 8, 2006, B183736) [nonpub. opn.] (*Rachel II*).) We grant the petitions.

BACKGROUND

This is the third time this case has come before us. Because the facts from *Rachel II* and a previous writ petition (*Michael O. v. Superior Court* (Dec. 20, 2004, B177948) [nonpub. opn.] (*Rachel I*)) remain relevant for understanding later events and the instant writ petitions, we review them here.

In March 2003, "Jeremy (born in 1994), Kaitlyn (born in 1996), and Rachel (born in 1998) . . . were adjudicated as dependent children under section 300 primarily because, after several months of voluntary family maintenance and preservation services, they continued to have problems with head lice and the family's apartment remained dirty and cluttered. After the children's removal, the parents resolved the problems [] identified by the petition and, by early August 2004 (the month before the 18-month permanency review hearing), were in full compliance with the dependency case plan." (*Rachel II*.)

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

In early August 2004, a Los Angeles County Department of Children and Family Services (DCFS) social worker found the parents' apartment to be clean and suitable except for a few cockroaches that remained after a recent fumigation. She recommended that the children be returned to their parents and instructed the parents to re-fumigate the apartment. A few weeks later, however, the social worker found additional cockroaches and droppings, saw this as a sign of the parents' failure to internalize the behavioral changes necessary to keep a clean home, and recommended termination of reunification services and setting a section 366.26 permanency planning hearing with adoption as the proposed permanent plan.

At the September 1, 2004, 18-month hearing, Michael testified that the apartment manager was not responding to his complaints regarding cockroaches and other maintenance problems. The social worker testified that the cockroaches were the sole basis for finding the parents' home "dirty," and that a dirty home was the sole obstacle to reunification, but that nevertheless, it was unsafe to return the children as long as the parents' home was "dirty." Michael also testified that Frances had recently inherited an "immaculate" and well-maintained single family home in a safe neighborhood near a school. Although the parents could move into this home during the next month, the court ordered them to remain in their apartment and keep it clean for at least another two months. The court criticized Frances for not keeping the apartment spotlessly clean or finding a job to help pay for better living quarters, and predicted that the new house would soon be dirty and cluttered, also. Despite noting the parents' full compliance with the case plan and the absence of the usual, more intractable dependency issues, the court determined that returning the children to their custody would put the children at risk physically or emotionally, terminated reunification services, and set the matter for a section 366.26 permanency planning hearing.

The parents sought extraordinary writ review of the court's September 1, 2004, order. In December 2004, in *Rachel I* we denied relief based upon the existence of substantial evidence to support the finding of detriment. At that time, the parties did not bring to our attention the facts regarding Frances' depression, the court's critical

comments on Frances' housekeeping, or the court's order that the parents remain in their allegedly roach-infested apartment although other appropriate housing was available to the family.

On April 8, 2005, Frances and Michael filed section 388 petitions to modify the September 1, 2004, order terminating reunification services and setting the permanency planning hearing based on the changed circumstances of (1) the parents' clean apartment and (2) Frances' dramatic improvement upon obtaining, for the first time, a medication for her depression that had gone untreated since the sudden deaths of her mother and father four years earlier.

Although DCFS staff reported that Frances was depressed in early 2003, and although psychologist Dr. Nancy Kaser-Boyd, Ph.D., examined Frances and Michael in April 2003 and found that Frances appeared to be clinically depressed, Frances received no medical treatment for her condition until February 2005, five months after the September 1, 2004, 18-month permanency review hearing. During the reunification period, Frances was referred twice to obtain a psychiatric evaluation, and both times she was briefly assessed and denied services. In her section 388 petition, Frances pointed out that through 57 sessions with her previous therapist, she received grief counseling but never discussion or help regarding depression. With proper help and proper medication, Frances achieved better emotional balance. She and Michael also stayed in their apartment for six months to prove to the court that they could keep a clean home. With her petition, Frances submitted her new therapist's reports, which found great improvement in her condition.

In January 2005, however, DCFS had reassigned this case to a new social worker who had not been present at the September 2004 18-month review hearing and failed to interview the parents or Frances' new therapist, check on the apartment's cleanliness, or observe the parents' visits with their children in preparation for the combined sections 388 and 366.26 hearing. She also erroneously stated in her report that Michael had failed to complete counseling and parenting classes. She found at most trivial problems in the

parents' apartment, but on that basis concluded that the parents had not internalized necessary behavioral changes and recommended termination of parental rights.

At the hearing pursuant to sections 388 and 366.26 on June 9, 2005, the dependency court stated that "nothing has changed" even though the parents had (1) received 28 months of family reunification services; (2) "never missed a hearing"; (3) "followed the case plan"; (4) "[r]emained a couple"; and (5) "[b]een through therapy and [done] whatever needed to be done...." (*Rachel II*.) The court found that Frances' clinical depression was not a changed circumstance because "we knew it was depression" at the start of the dependency proceedings. The court also rejected Frances' improvement due to her new medication as a changed circumstance because there was no "letter from a doctor saying that she's healthy; that there's been any change." The court said nothing about Frances' lack of medical treatment for her clinical depression during the reunification period. It also rejected the reports from Frances' new therapist. Based on the wholly inadequate information in the new social worker's report, and relying on grounds that DCFS never relied upon in its petition, the court found that the parents were still behaving inappropriately, found no changed circumstances, denied Frances' section 388 petition, reduced visitation from twice to only once per week, and, on June 14, 2005, terminated Frances' parental rights.

Both parents appealed the dependency court's orders. On February 8, 2006, we held that Frances had indeed shown evidence of changed circumstances that DCFS entirely failed to contradict, and that the lengthy delay in her receiving treatment for her clinical depression was not her fault, but rather proof of inadequate provision of services by DCFS. We noted that the mobility of cockroaches throughout an entire building made it unreasonable to hold the parents responsible for a cockroach problem they could not control, particularly when they had another home to move to if the court had allowed it. We considered the children's best interest using the factors identified in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526, and found that because Michael and Frances had maintained strong bonds to their children, and because the problems leading to dependency were not particularly serious and had been entirely resolved, reunification

was clearly in the children's best interest, and the dependency court had abused its discretion by denying Frances' section 388 petition.

As we observed in *Rachel II*, "The parents managed to achieve full compliance notwithstanding Frances' clinical depression for which she received no medical treatment until February 2005, five months after the September 2004 18-month hearing when services were terminated. [¶] The record is undisputed that the parents, notwithstanding their earlier difficulties, love their children deeply and have done everything in their power to maintain a close and loving relationship with them and overcome the problems which led to their removal. The record is uncontradicted that the parents have fully complied with the case plan and have consistently used visitation to bond with their children through [various educational or recreational outings]. It is undisputed that the children enjoyed their parents' visits. [¶] The only obstacle to reunification at the 18-month hearing was cockroaches."

We also found that the dependency court "made numerous inappropriate, inaccurate and injudicious remarks at both the 18-month hearing and the combined sections 388 and 366.26 hearing" that "demonstrated not only a bias against the parents but also an abuse of authority in the handling of the case." We concluded that the "pattern of indefensible and inappropriate remarks" demonstrated a "serious and disturbing pattern of bias" that destroyed our confidence in the court's ability to decide this case fairly and impartially, leaving us "no alternative but to direct that on remand the matter be reassigned to a different judicial officer of the dependency court." Due to the second social worker's failure to conduct a proper investigation for the June 9, 2005 hearing, we also ordered the dependency court to order DCFS to reassign the case to a different social worker.

Our disposition of the earlier appeal was explicit: "The June 9, 2005, order denying Frances' section 388 petition is reversed. The order restricting visitation and the June 14, 2005, order terminating parental rights are vacated. On remand, the matter is to be reassigned to a different judicial officer of the dependency court who shall enter a new order directing the Department to return the children to their parents' custody (unless new

circumstances would justify a new detriment finding). The dependency court shall determine whether to implement a family maintenance plan or to terminate dependency jurisdiction altogether. If the court maintains jurisdiction, it shall order the Department to assign the case to a new social worker with the necessary skills, experience and training to address any remaining concerns in this case."

On April 6, 2006, pursuant to our opinion in *Rachel II*, this case was transferred to a different commissioner for all further proceedings. On April 4, 2006, however, Rachel's counsel, who at that time also represented her two siblings,[2] filed a section 388 petition requesting that our orders be modified to allow Rachel to remain with her foster parents and to set a new 366.26 hearing as to her. Counsel attached a declaration from the foster parents stating that Rachel had improved greatly in their care, that she did not even want to telephone her parents, and that the caretakers had not influenced Rachel's position. Also supporting the section 388 petition was a report obtained at the request of counsel, dated March 10, 2006, from Dr. Kaser-Boyd, who had evaluated Frances and Michael in 2003. She interviewed Rachel and the foster parents and reported that Rachel was very affectionate with her foster parents, called them her mom and dad, was happy living with them, thought she had been adopted by them already and would never be returned to her biological parents, and said that she remembered but did not miss her "old parents" or their dirty home: "I didn't like the BUGS, and we had to walk all the time, or take the bus." She said that she fought with her sister, and that her brother had tried to touch her "private parts." At her foster parents' home, Rachel enjoyed various extra-curricular activities such as soccer, cheerleading, and music lessons. She claimed to have no good memories of life with her parents, focusing on negative memories of being dirty and having head lice and noting, "It's been so long ago." Although Dr. Kaser-Boyd had not met with either parent since 2003, had not observed Rachel's interaction with either

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2 On June 8, 2006, the dependency court relieved the attorney who had been counsel for all three children since the beginning of the proceedings and appointed new, separate counsel for Rachel and for Jeremy and Kaitlyn, after Frances filed a motion alleging that it was unethical for the original counsel to continue to represent the children.

parent or with her whole family, and based her evaluation on her earlier, outdated evaluations of Frances and Michael, she nonetheless noted that children raised by depressed parents did not form proper attachments to others. Despite the limitations of her information and observations, she concluded that to return Rachel to her parents would disrupt her sense of safety and security and would be clearly detrimental to her.

On April 21, 2006, the new social worker for Rachel and her siblings reported that Rachel's foster parents were opposed to any discussion of returning Rachel to her parents, to cooperating with a transition plan to do so, or to enrolling Rachel in therapy to prepare for her return; they vowed to "fight to the end" against returning Rachel. Rachel's foster mother later warned that the foster father might become "aggressive and hostile" when discussing Rachel or her return because of his firm feelings on the matter. Given this resistance and Dr. Kaser-Boyd's concerns, the social worker recommended a gradual transition plan to reunite Rachel and her parents.

In the meantime, Rachel's siblings were starting the process of being transitioned back to their parents' custody. The social worker found that the siblings' unmonitored weekend visits with their parents went well, with the children helping with chores, playing with the family pets, and spending time with their parents. The parents' new home was clean, organized, and without safety hazards.

By July 10, 2006, Rachel's elder siblings had been returned to their parents' home. They continued to have sibling visits with Rachel, where the children hugged and said that they loved each other. On July 10, 2006, the children's social worker reported that the foster parents still opposed reuniting Rachel with her parents, but that no new concerns had arisen to give any reason not to. On the same date, the juvenile court ordered Rachel into therapy forthwith and for the first time authorized visits that could also include the parents, albeit monitored.

Rachel's foster father insisted on being present at these visits despite DCFS staff telling him he could not. At the first visit, the foster parents remained in a car parked outside the McDonald's restaurant where the visit occurred. The visit was scheduled from 6:00 to 8:00 p.m. to accommodate Michael, who had to work until 6:00 and arrived

at 6:30. Rachel ran to her siblings and hugged and kissed them. The social worker reported, "After a couple of minutes of looking out the window towards the [foster parents'] car and appearing reluctant, Rachel approached her mother and hugged and kissed her." At the end of the visit, when the social worker returned Rachel to her foster parents, the foster father, referring to the instruction that he not attend family visits, said, "[T]his is the last time you pull a fast one on me."

The next visit took place in the same restaurant, with the family in one booth and the foster parents in a neighboring booth. This visit was held at 3:00 to 5:00 p.m. "to accommodate the [foster parents'] family time" after the foster father rejected the 6:00 to 8:00 p.m. time slot of the earlier visit. Frances, Jeremy and Kaitlyn arrived about 45 minutes late because they had to take the bus to get to the visit. Rachel hugged and kissed her mother and siblings and appeared comfortable with them while going back and forth between them and her foster parents. The social worker found the family visits appropriate, and that Rachel had fun with her siblings and conversed with her parents, "presented as comfortable with her parents," "referred to them as 'mom' and 'dad'", engaged in "mutual hugging and kissing," and showed no anxiousness with her biological family.

On August 9, 2006, the court still had not determined Rachel's section 388 petition, filed five months earlier, nor ordered Rachel returned to her parents, but instead ordered continued monitored sibling visitation which the parents could attend and continued the contested hearing to September. Despite the inevitable strain placed on Rachel by the foster parents' presence at family visitation and by her having to worry about antagonizing her foster parents while she interacted with her natural parents, the court ordered that they be allowed to attend.

On September 13, 2006, Dr. Ian Russ, a therapist hired by the foster parents, purportedly to provide Rachel therapy, testified on the basis of five therapy sessions that it would be detrimental to remove Rachel from her foster parents' home.[3] He reported

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3 The foster parents did not continue Rachel's therapy with Dr. Russ after he testified in court.

that Rachel refused to draw a picture of her "old" parents, and that she said she would "scream loud and forever" were she ordered to return home. The social worker again reported no detriment from returning Rachel, stated that "it appears at this time it is in the best interests of the children and family to move forth with the case plan [to reunite Rachel with her parents]," and recommended liberalizing visitation terms to allow unmonitored visits. The court refused to liberalize visitation and continued the hearing again.

On November 3, 2006, at the continued hearing, Dr. Russ concluded his testimony. He admitted that he had neither interviewed the parents, observed Rachel with her parents or siblings, nor discussed the case with her social worker, and had not been asked to do any of this, but he had read Dr. Kaser-Boyd's report and talked with the foster parents. He found stability in her foster parents' home "essential" to Rachel's growth and development, and that to remove her would be "very detrimental." He laid out a lengthy transition plan for reunification but stated that he did not think it would work in Rachel's case.

On November 8, 2006, Frances' counsel moved for appointment of an expert witness pursuant to Evidence Code section 730, arguing that the proceedings were fundamentally unfair because the foster parents had the resources to hire an expert witness but the parents did not. The court denied this request, stating that it did not need help to determine what was best for Rachel, that it did not find "bonding studies" helpful or appropriate, and that such studies were disfavored by courts in section 366.26 hearings. The hearing was continued to November 28, 2006 to allow Rachel to testify, then to December 21 because Frances' counsel was sick, then to January 18, 2007 because Rachel failed to appear. Rachel still was not returned to her parents, nor was the pending petition ruled on. Throughout this period, the court refused to liberalize the parents' visitation to make it more frequent or unmonitored.

In a report dated January 18, 2007, Rachel's social worker reported that Rachel's family visits were going well, that the family members talked and spent quality time together, and that both Rachel's parents were diligent and appropriate in interacting with

all the children. The social worker observed, "Rachel demonstrates no anxiousness during the visits with her parents and is able to call them 'mom' and 'dad' except when the [foster parents] are close enough to hear. [The caseworker] has observed some uncertainty on Rachel's part when calling [her biological parents] 'mom' and 'dad' as she looks to the [foster parents] for disapproval." The foster parents remained opposed to Rachel's reunification with her parents or any transitional plan, therapy, or discussion of the issue with her.

On January 18, 2007, the parents again requested appointment of an expert, and again the request was denied. Rachel testified that she enjoyed living with her foster parents, but was unwilling to say why. She identified Frances and Michael as her "old parents" and said she remembered living in their apartment. Asked whether she had liked living in her parents' apartment she said no, "Just because there was tons of cockroaches." Asked for any other reasons, she said there were none. She testified that she and her sister had fought often back then, but that she had liked her brother. Under questioning from the foster parents' counsel, Rachel described her fighting with her sister as "normal" sibling arguments and identified no problems concerning her brother. The foster parents' counsel elicited Rachel's testimony about trips to Las Vegas and Maui, her various extra-curricular activities, her success in school, and her good relationship with her foster parents and their grandchildren, and how she would miss all of them and her dog if she were returned to her family. Rachel said that she did not really enjoy family visits, but that this was only because she was tired of always going to McDonald's, and she said she would like more family visits at other locations. Rachel initially testified that she did not wish to live with her biological family, but did want to visit them "[s]ometimes." But when asked whether she might be willing to live with them if they had a nice home with no cockroaches where she could have her own room, Rachel said that would be "[o]kay" even if it meant that she could no longer live with her foster parents. Later, when asked how she would feel if she never got to see her biological family members again, she said that that, too, would be "okay." These and other

seemingly contradictory statements suggested that Rachel felt torn between her family and her foster parents and, in the presence of both, did not want to disappoint either side.

Counsel questioned Rachel further in chambers, where Rachel volunteered, "I do miss my brother and sister," although, in seeming contradiction, she indicated that she felt that she no longer knew them or her parents very well. Asked whether she was afraid even to visit her parents' house, she said yes, because "[t]here may be cockroaches." She said there was no other reason.

At the end of the January 2007 hearing, the parents requested unmonitored visitation, but the court refused to "lift the monitor until I finish the [entire section 388] hearing." The court made no decision on the petition, by then nine months pending, and continued the case to February.

On February 2, 2007, Rachel's social worker testified that the foster parents had been present at 15 of the 16 family visits and that the foster father's presence made Rachel uneasy during visits. She said that Rachel had no adverse reaction to her family. Regarding Rachel's first visit to her family's home, which the foster parents did not attend, the social worker testified that after overcoming initial reluctance to enter her family's new home, Rachel hugged her siblings, hugged Frances and called her "mom," hugged Michael and called him "dad" when he got home, and appeared comfortable and to be having a good time as the family had dinner. The social worker again recommended unmonitored visits and return of Rachel to her parents, though she acknowledged that return would involve difficult adjustments for Rachel. The social worker also testified that appointment of an expert under Evidence Code section 730 would be appropriate, and that contrary to the foster parents' position, Rachel needed therapy even if she were not returned to her biological parents.

On February 5, 2007, Frances and Michael testified that Rachel enjoyed her family visits every other week, showed affection to her family members, and wanted to know how they all were doing. Both parents announced their willingness to participate in therapy and counseling as needed and to allow visitation with the foster parents if Rachel were returned to her family. Frances reported that she was still under treatment for

depression and participated in individual and family counseling. Michael stated that for approximately a year, he and Frances never saw Rachel because of the court's order, and the foster parents would not allow them visits.

On February 6, 2007, Rachel's foster mother testified that she had an extensive background in child development, that she and her husband had allowed sibling (but not parental) visits to continue even after the parents' reunification services were terminated, that Rachel was "very civilized" during family visits and was happy to see her family as a group, that Rachel chiefly enjoyed playing with her siblings, that she had a more limited relationship with her parents, that these visits were chaotic and insufficiently regulated by the parents, that Rachel had a good relationship with the foster parents' grandchildren, that she or her husband attended family visits because Rachel asked them to be there, that they did not want to lose Rachel, and that Rachel had told them she did not want to leave their home. On February 15, 2007, Frances testified regarding a recent happy four-hour family visit at the family's new home at which the foster parents were not present, how Rachel entered the family home without hesitation, how excited and enthusiastic Rachel was to greet her family members, how she did not want to leave at the end, and how she and her siblings began to cry when Rachel had to leave. The social worker's testimony regarding the visit generally confirmed Frances' report. The social worker did not see whether Rachel cried or not, but reported that she became quiet when it came time to leave.

In closing arguments, Rachel's and the foster parents' counsel urged the court to leave Rachel with the foster parents; counsel for DCFS and for Rachel's siblings joined counsel for the parents in calling for Rachel's return to her family. After hearing closing arguments, the dependency court expressed confusion as to just what this court had ordered it to do by our remittitur. The court concluded, apparently based on our earlier opinion, that it was required to reconsider Frances' section 388 petition as well as rule on Rachel's section 388 petition. Relying primarily on the reports of Drs. Kaser-Boyd and Russ, disregarding or misinterpreting our order that Rachel be returned to her parents, and discounting the social worker's actual observations of the dynamics of Rachel's

family and her recommendation for return of Rachel to her parents, the court denied Frances' petition and granted Rachel's petition, stating that it would not be in Rachel's best interest to be returned to her parents. The court stated that "new detriment"—psychological harm to Rachel that Drs. Kaser-Boyd and Russ predicted if she were returned—justified the order, and set a new section 366.26 hearing for June 1, 2007.

Frances and Michael filed timely notices of intent to seek the instant writ.

DISCUSSION

Frances and Michael contend that the dependency court erred in failing to follow this court's directives in *Rachel II*. The foster parents maintain that the court followed our directives.

All parties agree that a trial court's jurisdiction upon remand is defined by the remittitur from the appellate court. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-705.) The parties disagree, however, on precisely what the remittitur from the earlier appeal in this case mandated. The parents contend that our remittitur commanded that Rachel be returned to them, and that the juvenile court had no authority to hear a section 388 petition. The foster parents contend that the remittitur left open the possibility that a party to the proceedings could prevent Rachel's return to her parents if that party filed, and the court granted, a section 388 petition alleging new circumstances to support a new finding of detriment if Rachel were returned to her parents.

Among other instructions to the dependency court in our remittitur, we ordered that this case be reassigned to a new judicial officer who would "enter a new order directing the Department to return the children to their parents' custody (unless new circumstances would justify a new detriment finding)." Thus our remittitur authorized the dependency court to consider a proper section 388 petition alleging new, changed circumstances.

A party who petitions to modify an existing dependency court order under section 388 must show, by a preponderance of the evidence, *both* changed circumstances and that the modification would be in the child's best interest. (§ 388; Cal. Rules of Court, rule

5.570(a), (h); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47, 48.) Rachel's petition satisfies neither requirement.

Our remittitur stated that only *new* circumstances that justified a new detriment finding could prevent Rachel's return to her parents. The only purportedly new circumstances identified in Dr. Kaser-Boyd's report and the foster parents' declaration attached to Rachel's petition—that Rachel might experience difficulties in readjusting to living with her parents, that she was doing well in the care of her foster parents and was bonded to them after three years in their care—were circumstances of which we were well aware when we issued our opinion in the earlier appeal. Indeed, our opinion from the earlier appeal recognized that there might be readjustment difficulties, but we expected that these difficulties could be overcome.[4] Rachel's section 388 petition offered no prima facie evidence of new circumstances defeating that expectation, and thus the court erred in proceeding with the hearings on the petition. (See *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072; *In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

The evidence produced by the unduly prolonged section 388 hearing process in this case merely confirmed that there was no sufficient basis to grant the hearing in the first place. The testimony of Dr. Russ, Rachel, and Rachel's foster mother, indicating that Rachel was bonded with her foster parents and that to remove her from her foster home might cause her emotional upset, revealed nothing of relevance that was not known when the appeal was decided. Nor does the record show any deterioration in the condition of Rachel, her parents, or their home; the evidence indicates that all are in good shape and had changed for the better.

Rachel and the foster parents contend that the psychological experts' warnings of potential dire impacts on Rachel's mental health from returning her to her parents showed

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4 Our opinion in *Rachel II* stated, "The family's bonds appear sufficiently strong to overcome Rachel's apparent desire to be with her foster parents which, as Michael points out, is probably related to her dislike of the bugs in the apartment. It is reasonable to expect, given the close and loving relationships in this family, that once Rachel is shown the new, clean home that is ready for the family's occupancy, she will adjust to the transition and welcome being reunited with her parents and siblings."

new circumstances and new detriment. But Dr. Kaser-Boyd's report and Dr. Russ' testimony were too incomplete to constitute substantial evidence. The experts only found that Rachel was a well-adjusted little girl who was happy living with her foster parents and had some unhappy memories of living with her parents more than three years earlier. They did not inquire into the current state of Frances, Michael, or their home, or whether any basis remained for Rachel's apprehensions about their home—which, as we have seen, was almost exclusively her dislike of cockroaches. The psychologists' statements about the parents' mental states, and their observations that children of depressed parents tend to have problems, were based on three-year-old evidence that ignored intervening events, including the parents' successful completion of a reunification case plan and Frances' successful treatment for depression. Even had the experts' statements about the parents' mental states been up to date, their statements would not have constituted substantial evidence to support a finding of new detriment. "'Harm to the child cannot be presumed from the mere fact of mental illness of the parent and it is fallacious to assume the children will somehow be "infected" by the parent. The proper basis for a ruling is expert testimony giving specific examples of the manner in which the mother's behavior has and will adversely affect the child or jeopardize the child's safety.'" (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1789.) Drs. Kaser-Boyd and Russ, in their vague, out-of-date references to Frances' depression and Michael's alleged narcissism, gave no such specific demonstration of harm. As such, their opinions provided no substantial evidence for a finding of a detrimental condition either in Rachel or in her parents.

Leaving aside the insubstantial psychological evidence, Rachel and the foster parents' argument basically is that it is in Rachel's best interest for her to remain with her foster parents because Rachel is strongly bonded to her foster parents, and they are better parents, or can provide her a better life, than her biological parents. Settled authorities require us to reject both these assertions. For although a child's bond to foster parents is an important consideration in dependency proceedings, it "cannot be dispositive. . . , lest it create its own self-fulfilling prophecy[.]" (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 531; see also *In re Jasmon O., supra*, 8 Cal.4th at pp. 408, 414-422 ["[T]he existence

of a successful relationship between a foster child and foster parent cannot be the sole basis for terminating parental rights[.]"].) Moreover, in considering the best interests of a child in dependency, the standard a court uses "cannot be a simplistic comparison between the natural parent's and the caretakers' households." (*In re Kimberly F*., *supra*, 56 Cal.App.4th at p. 530.) Although the foster parents have done well with Rachel and have demonstrated that they can provide her more economic advantages, "whether a child is reared in a more mainstreamed or socioeconomically advantaged household is not dispositive under section 388." (*Id*. at p. 529.) To treat it as dispositive would "ignore[] all familial attachments and bonds between father, mother, sister, and brother, and totally devalue[] any interest of the child in preserving an existing family unit[.]" (*Id*. at pp. 529-530.) Given Rachel's obvious strong bonding with her siblings, whom she testified in chambers to missing without prompting and who could be lost to her if she were adopted, as well as her bonding with her parents, we cannot ignore the value to Rachel of her family *as a whole*.

In sum, by granting Rachel's section 388 petition in the absence of substantial evidence showing either new detriment or that it would be in Rachel's best interest, the dependency court abused its discretion.[5] (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

To avoid this conclusion, Rachel and her foster parents invoke *In re Jasmon O.* (1994) 8 Cal.4th 398 (*Jasmon O.*) and *Constance K. v. Superior Court* (1998) 61

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5 Alternately, we find that the dependency court abused its discretion in various determinations made at the section 388 hearing. First, it reconsidered Frances' section 388 petition, after we reversed denial of that petition and ordered all of the children returned to their parents—the result Frances sought in her section 388 petition. The remittitur did not authorize the court to reconsider what was already clearly decided regarding Frances' petition. The dependency court also counted the parents' failure to reunify after more than 22 months of services against them, although our opinion in the earlier appeal made clear that this was because of the mishandling of the case by DCFS and the dependency court. The court noted that we had denied the parents' September 2004 writ petition challenging the termination of reunification services and setting of a 366.26 hearing, when our opinion made it clear that we would not have done so had we known of the judicial bias and inadequate performance by DCFS that we learned of later through the appeal. The dependency court also abused its discretion by relying on the outdated, incomplete evidence from Drs. Kaser-Boyd and Russ while refusing the parents' repeated requests to appoint a psychological expert under Evidence Code section 730.

Cal.App.4th 689 (*Constance K.*) to contend that we must uphold the dependency court's determinations. Both these cases, however, are readily distinguishable.

In *Jasmon O.*, the father, who had a history of drug dependence and mental illness, basically never had custody of his seven-and-a-half-year-old daughter, the mother relinquished the child when she was only six months old, and the foster parents truly were the only parents she ever had known. (*Jasmon O.*, *supra*, 8 Cal.4th at pp. 407-408.) The Court found "overwhelming" evidence of no parent-child relationship between Jasmon and her father. (*Id*. at p. 424.) Four psychologists, including the father's and two who were not associated with any party, concluded based upon current observations of Jasmon with her father that Jasmon already was suffering from serious mental illness as the result of entering into a transitional plan to return her to her father, and that her father was oblivious to her anxiety and pain. (*Id*. at pp. pp. 416-417, 424.)[6]

By contrast, there is no question that Rachel knows who her natural parents are, lived with them for more than four years, and had regular visits with them throughout most of the next four years. Even during the roughly one-year period after June, 2005 when the foster parents forbade parental visits, Rachel still had visits with her siblings and thus maintained the bonds with her family. Despite the year of separation from her parents, the record shows that Rachel easily and readily reconnected with her parents, showed no fear or anxiety toward them from the first reestablished visit onward, called

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6 Moreover, although in *Jasmon O.*, the Supreme Court held that "when a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child" (*id*. at p. 419), the Court also found no "fundamental substantive due process violation" and explicitly stated, "We do not mean to suggest by this opinion that we would overlook such a fundamental error, or that the child's bond with the foster parents could be the sole factor in making a placement decision should such fundamental error occur." (*Id*. at p. 422.) In this case, such fundamental error occurred: the termination of reunification services at the September 2004 section 366.22 hearing resulted from judicial bias and DCFS's inadequate provision of reunification services, as our opinion in the earlier appeal made clear. (See *People v. Brown* (1993) 6 Cal.4th 322, 333; *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) As such, Rachel and the foster parents' contentions that this case is now beyond the stage of focusing on preserving the family, and that the Supreme Court requires us to focus solely or primarily on Rachel's bond with her foster parents, are incorrect. We also note that nothing in the record indicates that Michael and Frances would not provide Rachel with a stable, permanent home, as they are now doing for Jeremy and Kaitlyn.

them "mom" and "dad," and hugged and kissed them—even as she was aware of the potential displeasure of her foster parents who were hovering nearby. In our opinion in *Rachel II*, we noted that the record showed strong bonding between all members of this family. The social worker, who unlike the psychological experts actually witnessed interactions between the parents and Rachel, confirmed that impression, reporting how Rachel hugged and kissed her family members and called her parents "mom" and "dad" during visits, and how she did not want to leave the family's home after her second visit there. That is not the behavior of a child who is not bonded to her parents and siblings.[7] The psychological evidence in this case, though inadequate and out of date, shows that Rachel is in excellent shape psychologically and thus is capable of adjusting successfully to being returned to her parents with whom she is bonded, unlike the troubled Jasmon O.

Constance K., on which Rachel and the foster parents rely most heavily, is similarly distinguishable. In *Constance K.*, "[q]ualified mental health professionals who were familiar with [the mother's] relationship with her children" concluded that the mother's three children should not be returned to her." (*Constance K.*, *supra*, at p. 708.) Drs. Kaser-Boyd and Russ could not, in 2006, claim to be familiar with Frances' or Michael's current relationship with Rachel on the basis of three-year-old psychological evaluations. The mother in *Constance K.* "had never had custody of any of her eight children on a full-time basis and been drug free" (*Constance K.*, *supra*, at p. 708); all of her children were in dependency or adopted (*ibid*.); she regularly exposed the children to their fathers who were drug-dependent convicted felons (*ibid.*); she did not remember how to fix a family dinner (*id*. at p. 709); her home was in disarray and still contained an unresolved hazard during a visit (*ibid*.); she still was showing indications of drug abuse

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[7] Rachel's often uncertain or contradictory testimony in court, especially numerous points at which she answered "okay" to difficult questions, appears mostly to reflect the stress she felt from her divided loyalties to her family and her foster parents. The one really clear message to come out of her testimony is that she intensely dislikes cockroaches.

(*ibid*.); and she hoped to marry one of the drug-dependent ex-convict fathers (*ibid*.). None of these risks are present in Frances and Michael's new home.[8]

DISPOSITION

The petitions for extraordinary writs are granted. Let peremptory writs of mandate issue directing the dependency court to vacate all of its orders and findings from the February 6, 2007 hearing, to vacate specifically the order resetting a section 366.26 hearing, to vacate, nunc pro tunc, the September 1, 2004 orders terminating the parents' reunification services and setting the first section 366.26 hearing, to deny Rachel's section 388 petition, and to grant, nunc pro tunc, Frances' and Michael's section 388 petitions that were filed on April 8, 2005. The dependency court shall enter an order directing DCFS and the foster parents to return Rachel to her parents' custody forthwith. The court may order DCFS to provide the family with services to help in the transition, but the return of Rachel to her parents may not be postponed due to any lack of services.

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8 The court in *Constance K.* also noted that return of the children would be detrimental because it would "end the loving and stable relationship which had developed over a two-year period in the foster home and place the minors in the problematical environment with their mother." (*Constance K., supra*, 61 Cal.App.4th at p. 709.) But the court made clear that its decision was based on all the detrimental factors in the case "[t]aken together[.]" (*Ibid*.) As we have seen, bonding to foster parents by itself is an insufficient basis for a detriment finding. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 531.) Nor is there any substantial evidence that the parents' home is a "problematical environment."

Because of the dependency court's record of resistance to Rachel's reunification with her parents, the dependency court is directed not to order any visitation between Rachel and her foster parents. Frances and Michael, as the parents of Rachel, may voluntarily and in their discretion permit the foster parents access to Rachel. Jurisdiction shall be terminated at the earliest possible time.

This decision is final forthwith. (Cal. Rules of Court, rule 8.264(b)(3).)

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

VOGEL, Acting P. J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)